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Supreme Court, U.S.
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No. 16-6316

OCTOBER TERM, 2016

In the Supreme Court of the United States

MICHAEL DAMON RIPPO,

Petitioner,

v.

TIMOTHY FILSON, Warden,

Respondent.

On Petition for Writ of Certiorari to the Nevada Supreme Court

Petitioner's Reply to Respondent's Brief in Opposition

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a capital case where the trial judge was being criminally investigated by the State and where the investigation concerned the judge's act of fixing cases for litigants, including for one of the State's witnesses who testified at Rippo's trial. The State's brief in opposition ("BIO") does not address the merits of Rippo's claim which reveals an extreme case of judicial bias. The State does however make factual assertions in passing that are being raised before this Court for the first time:

> Rippo has no evidence that his trial judge was being criminally investigated by the prosecution during his trial. The district attorney's investigation began only after the federal Indictment against the trial judge was unsealed, about a month after the conclusion of Rippo's trial.

BIO at 12. Counsel for the State's naked assertion that his office's investigation of the trial judge began only after Rippo's trial is inconsistent with his representations below that he had no personal knowledge of the facts of the State's investigation and had no intention of making himself aware of them. App. 555.

The State entirely fails to address its crucial role in the sting operation to bait the trial judge into taking bribes, the role of state law enforcement in the investigation, state law enforcement's participation in the execution of the search warrant on judge's home, and their interrogation of the judge. The State does not dispute that the trial judge was aware of all of these facts before the start of Rippo's trial, and that the judge knew which cases the State assisted the Chief Judge of the court in routing to the trial judge's department. App. 133. There can be no rational dispute that the average jurist in such a situation could not maintain a constitutional level of impartiality.

The State argues against a GVR in light of this Court's decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). However, its arguments only show why Rippo's case is more appropriate for plenary consideration than *Williams*. The State

distinguishes *Williams* "because it involved a claim of judicial bias in the immediate state court postconviction order under review, not a procedurally defaulted claim of judicial bias from trial." BIO at 11. The distinction the State identifies is one of the very reasons why Chief Justice Roberts dissented in *Williams*, i.e., because the alleged bias was unconnected to the petitioner's trial. *Williams*, 136 S. Ct. at 1913-14 (Roberts, C.J., dissenting). Here, the extreme and unusual facts showing the trial court was biased directly infect Rippo's convictions and death sentences. The distinction identified by the State shows, if anything, that Rippo's case presents an excellent vehicle for this Court's plenary consideration.

The State's primary argument is that the Nevada Supreme Court denied Rippo's judicial bias claim on independent and adequate state law grounds. The State acknowledges the state court's decision could have been based on federal constitutional grounds, but contends the constitutional ruling "is at most an alternative and unnecessary ruling in light of the primary holding of the case that Rippo had failed to establish good cause and deficient performance of first postconviction counsel to overcome the state procedural default." BIO at 9. "Even if it is true that the consideration of prejudice necessitated some review of the merits of the [federal] claim, lack of good cause or deficient performance remain unaffected and are an adequate basis alone to deny relief under the state procedural bars." *Id.* at 8.

The State's argument that there are alternative state grounds for the Nevada Supreme Court's decision that are independent of federal law constitutes a material mischaracterization of the decision. The State does not cite any part of the state court's ruling respecting Rippo's judicial bias claim that is based on "good cause or deficient performance" that is independent of federal law. The State cites to part of the Nevada Supreme Court's decision, but it conspicuously omits relevant language showing the decision is not independent of federal law, by hiding it within an ellipses to a block quote. BIO at 6. The relevant language not included in the State's block

quotation shows the Nevada Supreme Court's "good cause" ruling was predicated upon an antecedent ruling of federal law:

> Because this court had rejected the generic proposition that the trial judge had to be disqualified in all criminal cases while he was subject to the federal investigation, *Rippo*, 113 Nev. at 1248, 1249 & n.1, 946 P.2d at 1023 & n.1, and the new information still does not *establish judicial bias in this case*, Rippo has not demonstrated that the judicial-bias claim is 'one that any reasonably competent [habeas] counsel would have' reasserted or that the claim would have entitled him to relief, [citation]. Therefore, the post-conviction claim lacks merit and is not adequate cause to excuse the procedural default of the judicial-bias claim under NRS 34.810(2).

App. 34, *Rippo*, 368 P.3d at 745 (emphasis added). The Nevada Supreme Court's "good cause" ruling is based on the antecedent ruling that "the information still does not establish judicial bias in this case." *Id.* This is a federal constitutional ruling.

Rippo argued that the Nevada Supreme Court's procedural rulings were based entirely upon antecedent rulings of federal law. Petition at 20 n.6. The State acknowledges "the only claim reviewed 'on the merits' was the claim of ineffective assistance of postconviction counsel which Rippo offered as good cause to overcome the procedural default for his untimely and successive petition." BIO at 8. Rippo's arguments of ineffective assistance of first state post-conviction counsel allow him to overcome all of the procedural default rules cited by the State, see BIO at 7-8. "[W]here a petitioner [like Rippo] is entitled to the appointment of postconviction counsel pursuant to a statutory mandate, the ineffective assistance of that counsel may provide good cause for the filing of a second petition." App. 03, *Rippo*, 368 P.3d at 733. As explained above, the relevant parts of the Nevada Supreme Court's decision respecting Rippo's judicial bias claim, i.e., that he cannot show good cause based upon ineffective assistance of post-conviction counsel, is a decision based solely on antecedent federal constitutional grounds. *E.g.*, *Ake v. Oklahoma*, 470 U.S. 68,

74-75 (1985). There are no alternative grounds that are independent of federal law as the State argues.

The State does not dispute the fact that the Nevada Supreme Court's law of the case ruling is a decision on the merits of Rippo's judicial bias claim. The State acknowledges the Nevada Supreme Court "relied in part on the law of the case doctrine to affirm the denial of Rippo's judicial bias claim . . . ." BIO at 10. The State's only argument is that these cases are distinguishable because Rippo's case also concerns ineffective assistance of first state post-conviction counsel. *Id.* at 7-8. As explained above, that ruling was based on federal constitutional law.

CONCLUSION

For the foregoing reasons, Rippo respectfully requests that this Court grant his petition for certiorari and vacate the decision of the Nevada Supreme Court. In the alternative, he requests that this Court grant the petition, vacate the state court's decision, and remand for further consideration in light of *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

Respectfully submitted, this 15th day of November, 2016.

Respectfully submitted,

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November 15, 2016

Mr. Scott S. Harris, Clerk of the Court
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: *Michael Damon Rippo v. Timothy Filson*

Dear Mr. Harris:

I have enclosed for filing in the above-captioned case the original and eleven copies of the following Petitioner's Reply to Respondent's Brief in Opposition.

Please return one file-stamped copy of the enclosed Petitioner's Reply to Respondent's Brief in Opposition using the envelope provided herein for your convenience.

Thank you for your assistance in this matter.

Sincerely,

David Anthony
Assistant Federal Public Defender

NOV 17 2016

Enclosures

No. 16-6316

OCTOBER TERM, 2016

In the Supreme Court of the United States

MICHAEL DAMON RIPPO, Petitioner,

v.

TIMOTHY FILSON, Warden, Respondent.

On Petition for Writ of Certiorari to the Nevada Supreme Court

CERTIFICATE OF SERVICE

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I, David Anthony, an attorney who is authorized to file a Petitioner's Reply to Respondent's Brief in Opposition on behalf of Michael Damon Rippo hereby certify that on this 15th day of November, 2016, one copy of the Petitioner's Reply to Respondent's Brief in Opposition, in the above-entitled case were mailed, first class postage prepaid, to Adam Paul Laxalt, Attorney General of Nevada, 100 North Carson Street, Carson City, Nevada 89701, and Steve S. Owens, Deputy District Attorney, 200 East Lewis Avenue, Las Vegas, Nevada 89101, counsel for the respondents herein. I further certify that all parties required to be served have been served.

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